

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 RICK PERRY, GOVERNOR OF TEXAS, :

4 ET AL., :

5 Appellants : No. 11-713

6 v. :

7 SHANNON PEREZ, ET AL. :

8 - - - - - -x

9 and

10 - - - - - -x

11 RICK PERRY, GOVERNOR OF TEXAS, :

12 ET AL., :

13 Appellants : No. 11-714

14 v. :

15 WENDY DAVIS, ET AL. :

16 - - - - - -x

17 and

18 - - - - - -x

19 RICK PERRY, GOVERNOR OF TEXAS, :

20 ET AL., :

21 Appellants : No. 11-715

22 v. :

23 SHANNON PEREZ, ET AL. :

24 - - - - - -x

25 Washington, D.C.

1 Monday, January 9, 2012

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3 The above-entitled matter came on for oral
4 argument before the Supreme Court of the United States
5 at 1:00 p.m.

6 APPEARANCES:

7 PAUL D. CLEMENT, ESQ., Washington, D.C.; on behalf of
8 Appellants.

9 SRI SRINIVASAN, ESQ., Principal Deputy Solicitor
10 General, Department of Justice, Washington, D.C.; for
11 United States, as amicus curiae, supporting
12 affirmance in part and vacatur in part.

13 JOSE GARZA, ESQ., San Antonio, Texas; on behalf
14 of Appellees.

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1 P R O C E E D I N G S

2 (1:00 p.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument next today in Case 11-713, Perry v. Perez and
5 the consolidated cases.

6 Mr. Clement.

7 ORAL ARGUMENT OF PAUL D. CLEMENT

8 ON BEHALF OF THE APPELLANTS

9 MR. CLEMENT: Mr. Chief Justice, and may it
10 please the Court:

11 The judicial maps drawn here are truly
12 remarkable. They reflect the reality that the district
13 court below lost sight of first principles. The court
14 repeatedly invoked the principle that these were only
15 interim maps and not remedial maps, but that obscures
16 the reality that a court has the authority to draw an
17 election map, surely one of the most powerful judicial
18 tools in the judicial arsenal, only if it is identifying
19 specific statutory or constitutional violations or a
20 substantial likelihood thereof.

21 JUSTICE SOTOMAYOR: Mr. Clement, section 5
22 says you can't draw new maps unless they have been
23 precleared. You can't put them into effect.

24 MR. CLEMENT: But --

25 JUSTICE SOTOMAYOR: So the only thing that

1 exists is old maps until you get the preclearance.

2 I don't see how we can give deference to an
3 enacted new map, if section 5 says don't give it effect
4 until its been precleared.

5 MR. CLEMENT: Well, Justice Sotomayor,
6 obviously section 5 is clear that the new map drawn by
7 the Texas legislature, the new maps drawn by the Texas
8 legislature, cannot take effect of their own force. But
9 that doesn't answer the question of whether a judge when
10 having to impose a remedial map to address what all
11 concede is a one-person, one-vote problem with the
12 benchmark maps can look to the new maps which also
13 remedy that same one-person, one-vote problem, for
14 guidance. And this Court in its --

15 JUSTICE SOTOMAYOR: But you are asking for
16 more than for guidance. You are asking for deference.
17 You are saying they have to start with the new map even
18 though that map hasn't been approved.

19 MR. CLEMENT: That's right, Your Honor.

20 JUSTICE SOTOMAYOR: Instead of starting, as
21 the court below did, with the old map which had been
22 approved.

23 MR. CLEMENT: Right. We are, in fairness we
24 are asking for it to be used as the starting point for
25 drawing the new map, but that's because --

1 JUSTICE SOTOMAYOR: Doesn't that turn
2 section 5 on its head?

3 MR. CLEMENT: No, I don't think so, Your
4 Honor, for a number of reasons. One is that the
5 obligation to go to the preclearance court or to go to
6 the Attorney General remains fully in place. So the
7 only question is, what is going to inform the district
8 court in Texas's exercise of remedial authority to
9 remedy the one-person, one-vote problem with the
10 remedial plans -- with the benchmark plans, rather.

11 Now, this Court from the very beginning of
12 its reapportionment cases has emphasized the need to
13 look for legislative guidance in order to inform the
14 judicial exercise of solving that reapportionment
15 problem; and the need to look to the new maps I think is
16 most acute, of course, with the congressional maps,
17 because the benchmark is -- is a fine map, but it's a
18 map for 32 seats. And Congress here -- the legislature
19 of Texas has spoken as to how it would like to divide
20 the new 36-seat allocation up, and it seems to be quite
21 odd that the court would simply ignore that judgment
22 when it could look to that as the starting point.

23 JUSTICE GINSBURG: It didn't ignore it. It
24 took it into account along with other plans. My -- Mr.
25 Clement, suppose the D.C. court that has exclusive

1 authority over preclearance in mid-February denies
2 preclearance. And suppose -- suppose we accept your
3 position. You prevail in -- in this proceeding. And
4 then the three-judge district court says this -- this
5 plan -- these plans do not meet the section 5
6 requirement, we deny preclearance. What happens if we
7 use the Texas plan that has not been precleared as the
8 interim plan?

9 MR. CLEMENT: Well, Justice Ginsburg, as a
10 practical matter I suppose at that point Appellees would
11 go to the court in Texas and say: You need to revise
12 your interim maps once again.

13 Now, I think, since the premise for the
14 court drawing its interim maps is that time is of the
15 essence, it can't wait any longer, the Texas court may
16 deny that motion or it may grant that motion. I mean I
17 don't -- I don't really have a crystal ball to take that
18 into account.

19 But what I do think is particularly
20 anomalous is let's suppose that the D.C. court does deny
21 preclearance. At that point it's common ground that the
22 plan, the legislatively enacted plan, even though it's
23 denied preclearance, would be something that the Texas
24 court would have to defer to. That's basically Upham.

25 So it's, the oddity of the other side's

1 position --

2 JUSTICE GINSBURG: I don't see how it's
3 basically Upham. That was a plan -- there were two
4 contiguous districts, there was a problem with them, the
5 Attorney General said the rest of it was okay. Here the
6 entire plan, the plans are -- are opposed.

7 MR. CLEMENT: Well, Justice Ginsburg, I mean
8 it's true that the Justice Department does raise a
9 purpose objection to the plans as a whole, but of course
10 even that takes its force from the way particular
11 districts are being drawn. It seems to me quite likely
12 that, you know, obviously our position is that the D.C.
13 court is most likely to grant preclearance; but if they
14 were to deny it, it seems quite likely that they would
15 deny it as to particular districts, and then Upham would
16 make clear that you would give, that the Texas court
17 would give deference to the legislative plan.

18 And the anomaly of the other side's position
19 is you give less deference to a plan when preclearance
20 is pending than you do when preclearance is denied.

21 JUSTICE ALITO: Can I ask you a question
22 about timing? Let's suppose that the district court in
23 Washington moves expeditiously and issues a decision in
24 mid-February. Are there insuperable problems with
25 postponing the Texas primary so that the plan that is to

1 be used can -- doesn't have to be formulated until after
2 the district court in Washington has ruled?

3 Texas has a very early primary. Some States
4 have them for congressional races in -- in the fall, and
5 the latest presidential primary I think is at the end of
6 June. So why can't this all be pushed back, and
7 wouldn't that eliminate a lot of the problems that we
8 are grappling with in this case?

9 MR. CLEMENT: Well, Justice Alito, two --
10 two answers: One is, as a practical matter all of the
11 affected, you know, entities in Texas have gotten
12 together and they have agreed on the ability to move the
13 primary back to April, given -- on the assumption that a
14 map could be in place by February 1st.

15 Now, the primary has been moved from March
16 to April already, so I can't tell you that it's
17 impossible to move it again. But it's also quite, you
18 know, in a sense, I mean, the question becomes, I mean
19 Texas has made its own determination that it wants to
20 have a relatively early primary. That's not something
21 that popped up for this set of elections. It's had that
22 in place since at least 1988. And so the question is
23 how much do you want to interfere with that judgment.

24 JUSTICE ALITO: Well, if we have a binary
25 choice, if it's either the plan enacted by the Texas

1 legislature or the plan that's already been drawn up by
2 the court, yes, that could be presumably resolved rather
3 quickly. But what if neither of those is fully
4 acceptable. Then is it -- is it practicable to have the
5 primary on the date that's been agreed on? And if not,
6 then would you just prefer to limit us to those two
7 possibilities or would Texas entertain the possibility
8 of moving the primary back?

9 MR. CLEMENT: Well, look. Texas wants the
10 Court to have the opportunity to get this right. We
11 think the decision below is profoundly wrong. We think
12 it's important for this Court to send a clear signal to
13 the courts that would provide relief not just in this
14 case but to future situations where this arose.

15 JUSTICE KENNEDY: Just one more question.

16 MR. CLEMENT: Sure.

17 JUSTICE KENNEDY: Background question about
18 preclearance. Assume that the court of appeals -- the
19 three judge district court in Columbia in the
20 preclearance proceeding finds some problems with two or
21 three of the districts, say, in the congressional plan.
22 Does it just say, "there are problems with these
23 districts, we therefore deny preclearance," or does it
24 then give guidance and say, "we would give preclearance
25 if you made the following changes"? In other words,

1 does it give you a road map? How do these decisions
2 work? That's what I'm asking.

3 MR. CLEMENT: Well, I don't think there is a
4 road map for the extent to which they give a road map.
5 I think there are two things that are crystal clear.
6 One is that when the D.C. authority, be it the Attorney
7 General or the court denies preclearance, it denies
8 preclearance. The plan is not precleared. There is no
9 such thing as preclearance in part or partial
10 preclearance. As the Justice Department puts it, it
11 doesn't work like a line item veto.

12 Now, that's not to say -- and here's the second
13 point. That's not to say that the court doesn't provide
14 reasoning for its decision or the Attorney General. And
15 that's why in Upham, for example, that the court -- this
16 Court knew that the objections were to two particular
17 districts, even though the effect in Upham was to not
18 preclear the whole plan. And it seems to me the mistake
19 of the district court is it effectively treats the
20 unprecleared plan as a nullity. And that's the exact
21 word that Judge Johnson used in the lower court opinion
22 in Upham.

23 And this Court reversed and it said: No,
24 you don't ignore that; but on the other hand, what you
25 do is you take into account the judgment of the Attorney

1 General in that case, but other than that, you take the
2 plan into account notwithstanding the fact that it
3 hasn't been precleared.

4 JUSTICE KAGAN: But we've said over and
5 over, Mr. Clement, that it's the Attorney General and
6 the district court in D.C. that has exclusive
7 jurisdiction over this set of questions and that we
8 don't want courts in other parts of the country to try
9 to mimic what those -- what that court and the Attorney
10 General are supposed to do.

11 And you are essentially asking for the
12 district court in the State of Texas to try to predict
13 what they are going to do and to mimic what they are
14 going to do. And that's why Justice Alito suggests,
15 well, look, if we said that only the district court in
16 D.C. and the Attorney General should do this, let's wait
17 until they do it and go from there.

18 MR. CLEMENT: Well, Justice Kagan, here's
19 why we are not asking the regional court to mimic the
20 D.C. court's function. We are asking it to perform
21 correctly the one -- one of the roles that this Court
22 has always made clear the regional court retains. And
23 that's to provide temporary relief.

24 If you look at this Court's decisions that
25 essentially warn off a regional court from arrogating to

1 itself the final preclearance decision -- I'm thinking,
2 for example, of Connor against Waller -- those same
3 decisions say, but this is not with prejudice to your
4 ability to provide temporary relief.

5 Now, our position is quite simple. If we
6 are in a situation where the regional court has to
7 provide temporary relief, then it should apply the same
8 standards that always apply everywhere to courts issuing
9 temporary relief.

10 JUSTICE KAGAN: But you are not taking into
11 account the fact that, as Justice Sotomayor said,
12 section 5 itself operates as an injunction. And it's an
13 injunction against the use of an unprecleared plan.

14 MR. CLEMENT: Justice Kagan, I think we are
15 taking that into account. I mean -- and I think that's
16 at the heart of what's going on here. You have to ask
17 yourself the question: What is the remedy that the
18 Texas court in this case was trying -- what is the
19 violation, rather, that the Texas court was trying to
20 remedy. The Appellees proceed and I think your question
21 proceeds on the assumption as if the violation is a
22 section 5 violation. But that's not what motivated the
23 court's opinion, and you can -- I mean, look at page 96
24 of the Joint Appendix, where the court specifically
25 says: Look, Texas has always been cleared. They need

1 to get preclearance. So this is not about enjoining
2 them from implementing the plan. The constitutional
3 violation that is being remedied here and the only thing
4 that gave the Texas court any authority is the one
5 person, one vote violation with the old plans.

6 JUSTICE BREYER: That's what they said they
7 are doing. I mean, I count eight times in the House
8 plan, the State house plan, and several times in the
9 senate plan where it's clear and I think it's fairly
10 clear in the U.S. House plan, they say things like:
11 "The court began by considering the uncontested
12 districts from the enacted plan that embraced neutral
13 districting principles, although it wasn't required to
14 give any deference." And you say they are wrong about
15 that. "The court attempted to embrace as many of the
16 uncontested districts as possible."

17 So after I got finished reading their
18 opinions I thought, well, there may be a difference
19 between what you say and they say, but I'm not sure that
20 there is a difference that is reflected in the maps.

21 And so it's now January 9th. We have to
22 have something in effect by February 1st. They said
23 that they are paying attention to what the legislature
24 did and when I looked at the maps, as far as I can tell,
25 they include some more, some less, most in the State

1 senate, but they include a lot of the State's changes.
2 So what am I supposed to do? I mean, I can't tell
3 whether you are right or wrong without looking district
4 by district by district by district. What am I supposed
5 to do on January 9th?

6 MR. CLEMENT: Well, I think on January 9th,
7 Justice Breyer, you should take another look at El Paso
8 County. Because I think if you look at El Paso
9 County --

10 JUSTICE BREYER: In which -- in which --

11 MR. CLEMENT: In either the congressional
12 map or the house map. I think if you look at El Paso
13 county what you cannot conclude is that all ---

14 JUSTICE SOTOMAYOR: What district is that?

15 MR. CLEMENT: What's that?

16 JUSTICE SOTOMAYOR: What district is that?

17 MR. CLEMENT: Well, it depends. If we are
18 looking at the congressional map, I believe it's
19 district 16 or 17. And those maps start on page 1.

20 JUSTICE BREYER: Okay. El Paso County in
21 the original plan I guess was all like number 16. I've
22 got it in front of me. And they split it, and it was
23 split somewhat differently or not. Okay. Then what
24 else?

25 MR. CLEMENT: Well, I mean, I think you are

1 understating it. I mean, on the benchmark plan --

2 JUSTICE BREYER: No, no, right.

3 MR. CLEMENT: -- there is a whole straight
4 line. On the enacted plan it was a different straight
5 line.

6 JUSTICE BREYER: Correct.

7 MR. CLEMENT: And in the --

8 JUSTICE BREYER: All right. So right now,
9 why is that wrong? Why is that wrong? Tell me why it's
10 wrong for them to do that?

11 MR. CLEMENT: I want to say two reasons why
12 it's wrong, but first I think that really does answer
13 your premise, which is that all the court was doing was
14 remedying one person, one vote.

15 JUSTICE BREYER: No, no, I didn't say that.
16 I said in their way of thinking they are taking the map
17 into account. Now, to sit -- the enacted one. If I
18 disagree with that, I can't disagree at the level of
19 principle, I have to disagree at the level of particular
20 districts. That's why I asked you the question. So you
21 point to district 16 and I say, very well, tell me what
22 they did wrong, and why? Because, remember, they are
23 facing a challenge that's based on section 5, part
24 purpose.

25 And the district court there said in the

1 D.C.: You don't survive -- I can't give you a summary
2 judgment on that; purpose here may have been violated.

3 All right, now you tell me what's wrong with
4 district 16, which I guess is your strongest case? That
5 would be helpful.

6 MR. CLEMENT: No, what I'm -- I'm not saying
7 it's my strongest case. I'm saying it's illustrative of
8 the problem. Another thing that's illustrative of the
9 problem --

10 JUSTICE SOTOMAYOR: But what's was the
11 problem?

12 JUSTICE BREYER: Tell me what's the problem?

13 MR. CLEMENT: The problem is that the court
14 lost sight of what it was supposed to be doing. It was
15 supposed to be --

16 JUSTICE BREYER: What you said they were
17 doing. They couldn't have lost sight at the level of
18 generality, because at the level of generality they
19 said: We are trying to take into account the map. I'm
20 just repeating myself.

21 I want to know what is wrong with the
22 drawing of district 16, what they did, given that there
23 is a section 5 challenge based on purpose?

24 MR. CLEMENT: And what's wrong with it is
25 because they neither started with the old benchmark plan

1 and said we are going to solve the one person, one vote
2 problem, nor did they start with the new legislative
3 plan and say is there some violation that allows us to
4 change that plan. They instead, as they told you said
5 that they were on their own drawing an independent map.

6 JUSTICE SOTOMAYOR: I'm sorry. That's
7 incomplete.

8 CHIEF JUSTICE ROBERTS: You can finish,
9 finish your answer, please, Mr. Clement.

10 MR. CLEMENT: What I was hoping to say is
11 that they -- they told you they were drawing an
12 independent map, and what they told you is that they
13 thought that they were under an affirmative obligation
14 not to defer to the legislative enactment because it
15 hadn't been precleared. And the oddity of this -- I
16 mean look, you're right. In certain places, they then
17 turn around and say: But we deferred where we could.
18 But the oddity of their position is their first premise,
19 which is the one thing we can't do in drawing these
20 maps, is look at that -- look at that unprecleared map.
21 There's no explanation for why, if that premise was
22 right, why would it be even a good thing that were
23 pointing to the other map.

24 JUSTICE SOTOMAYOR: Counsel, I'm not sure
25 how I understand that, okay? As I looked at one of the

1 El Paso maps, the enacted map created a antler-type
2 district, a head and two unconnected antlers on top,
3 nothing tying them together.

4 The district court went back to the
5 benchmark and said: This is the benchmark district, now
6 I'm going to draw the districts around it that fall
7 naturally, trying to stay within neutral principles of
8 not dividing up the city more than I have to, and it
9 came out with another district.

10 I don't understand what principle, what
11 legal principle, the district court was violating that
12 makes what it did with that particular county wrong.
13 You're saying they should have given deference to an
14 oddly-shaped district that changed a prior benchmark
15 that's been challenged as having been created
16 specifically to minimize the Latino vote.

17 All of the challenges that relate to El Paso
18 are very significant. The district court has already
19 denied summary judgment on that. Tell me what legal
20 principle they violated, other than the deference
21 principle that you're relying upon?

22 MR. CLEMENT: The basic principle they
23 violated is they drew an interim order that they thought
24 wasn't a remedial order without it being based on any
25 finding of substantial likelihood of a violation.

1 JUSTICE SOTOMAYOR: That's your --

2 MR. CLEMENT: You may be right. You may be
3 right. There may be a problem with those maps in El
4 Paso. I don't think so, and I would like to talk about
5 that.

6 But if the district court had said, you
7 know, there's a problem with this because the two
8 antler -- the deer with two antlers, that violates --
9 that's a substantial likelihood of violating the
10 Constitution. We're going to remedy that. If that's
11 what they did, this would be a very different case.

12 Now, I do want to talk about the deer with
13 two antlers, because what that ignores is that in the
14 benchmark plan, the deer had one antler and an antenna.
15 And so the district court -- the map the district court
16 drew doesn't look anything like the benchmark, and
17 actually the map that the legislature drew looks very
18 much like the benchmark.

19 And so I think that just shows that what was
20 going on here by the district court was something very
21 different from either remedying a one-person, one-vote
22 problem with the benchmark or from correcting specific
23 identified problems with the legislative --

24 JUSTICE SCALIA: I -- I had thought,
25 Mr. Clement, that -- that one of your objections was

1 that in deciding whether they're using the benchmark
2 or -- or the -- the legislature's proposed new plan,
3 whichever one they're using, they -- in drawing up their
4 own plan, they assumed the validity of all of the
5 challenges.

6 Is -- is that not the case?

7 MR. CLEMENT: Well, that is the case, Your
8 Honor, and that is one of the many problems with the way
9 that the Court proceeded here. Because once you lose
10 sight of the fact that, look, we only have remedial
11 authority if we're remedying substantial likelihood of
12 violations that are identifiable and particular, well,
13 then what are you going to do?

14 What this district court did, after he
15 started where Justice Breyer suggested, is that the
16 district court judges then said: Look, we want to avoid
17 the challenges that are brought by the plaintiffs. And
18 what they mean by "avoid" is they basically take all the
19 allegations at face value and then redraw --

20 JUSTICE KENNEDY: But you don't have any
21 problem, if I'm a district judge and I think there is a
22 substantial likelihood that a particular challenge would
23 succeed, you don't have any problem with my drawing an
24 interim plan to avoid that likelihood.

25 MR. CLEMENT: Absolutely no problem at all,

1 Justice Kennedy. And the great thing about that is that
2 gives the district court a familiar role to play
3 applying familiar standards, and it gives this Court
4 something to review.

5 JUSTICE GINSBURG: But the district court in
6 that -- in that scenario is projecting what the D.C.
7 court that has exclusive authority is going to do. And
8 that's why I find your -- your position troublesome.
9 You're asking one court to make its best guess at what
10 another court is likely to do, and that other court has
11 exclusive jurisdiction.

12 MR. CLEMENT: Can I respond to that, Justice
13 Ginsburg, as follows, which is, I had assumed that
14 Justice Kennedy's question was not specific to section 5
15 and could just as well be a section 2 problem --

16 JUSTICE KENNEDY: Section 2.

17 MR. CLEMENT: -- or an equal protection
18 under the Constitution problem. And in this case, there
19 is no problem. All the court is doing is making a
20 substantial likelihood determination of an issue that
21 it's ultimately going to confront.

22 JUSTICE KAGAN: But haven't we also said
23 that, with respect to section 2 and constitutional
24 violations, that those allegations would be unripe in
25 the -- prior to the district court or the Attorney

1 General clearing a plan?

2 MR. CLEMENT: Absolutely, Justice Kagan.

3 But I think it's important to understand that to the
4 extent that the district court in this remedial phase
5 should take section 5 into account, it's just in
6 considering whether or not the remedial plan is
7 consistent with section 5 principles. And that's what
8 the judges did in this case with respect to their own
9 plan. So we're not I'm asking them to do something with
10 section 5 that they otherwise wouldn't do.

11 And again, I think if you come back to the
12 particular question of what are they trying to remedy,
13 they are trying to remedy the one person, one vote
14 problem. So if that's what they're trying to remedy,
15 why wouldn't they take into account the legislative
16 policy judgments reflected in the unprecleared plan if
17 that's -- if that's the state we're in, if that's the
18 snapshot we're in.

19 Keep in mind, this Court has throughout --

20 JUSTICE KAGAN: Well, just because section 5
21 says that there's no presumption of regularity attached
22 to that plan, and indeed, that it's unlawful to put that
23 plan into effect without the proper approvals.

24 MR. CLEMENT: Two things, Justice Kagan.

25 One, I would beg to differ that what section

1 5 says is that there's no presumption of regularity.

2 And I think that's -- it's not just a quibble. Because

3 I think if what section 5 says is that there's no

4 presumption of regularity, or no presumption of good

5 faith, then section 5 I think is closer to the

6 constitutional edge than this Court said in Northwest

7 Austin. I think all it says --

8 JUSTICE KAGAN: Section 5 says somebody has
9 to clear it before it can go into effect.

10 MR. CLEMENT: Absolutely. But I don't think
11 that means that the assumption is that the legislature
12 didn't act in good faith in enacting the provision. And
13 that brings me to my second point --

14 JUSTICE KAGAN: Nobody said the opposite.
15 The question just is, does somebody have to clear it?
16 Here, it wasn't clear.

17 MR. CLEMENT: Okay. I agree, but then the
18 question is, if there's not a presumption of bad faith,
19 then why wouldn't the Court take that legislative
20 judgment into account in drawing its remedy for the one
21 person, one vote violation in the remedial district?

22 If I could add my second point, which is the
23 other thing to keep in mind is the preclearance
24 obligation is not driven by congressional judgment that
25 these covered jurisdictions are particularly bad at

1 remedying one person, one vote problems.

2 Obviously, section 5 is driven by concerns
3 about racial discrimination. So in that sense it's
4 particularly odd, given that what's at issue here is a
5 remedy for a one person, one vote problem that you would
6 assume that you're not going to take into account the
7 legislature's judgment as reflected in an unprecleared
8 claim.

9 JUSTICE KAGAN: No, I don't think --

10 CHIEF JUSTICE ROBERTS: Counsel, I think
11 there's -- I see two different problems and I'm not
12 quite sure how they come out. One, you cannot assume
13 that the legislature's plan should be treated as if it
14 were precleared. The district court in Texas cannot
15 assume or presume what the district court here in D.C.
16 is going to do.

17 But on the other hand, it can't presume it
18 the other way. In other words, it can't draw its
19 interim plan assuming that there are going to be these
20 section 5 violations, because that's presuming what the
21 Court's going to do the other way.

22 So how do we decide between those two -- you
23 have two wrong choices. How do we end up?

24 MR. CLEMENT: Well, I think you try to split
25 the difference by trying to apply the preliminary

1 injunction standards. And I think if you do that, then
2 what you're going to do is that you're going to ensure
3 that the remedy that the district court draws for -- as
4 an interim matter for the one person, one vote problem,
5 which is not the same thing as preclearance, that remedy
6 is both consistent with the legislative policy
7 judgments, but also with section 2, with the Equal
8 Protection Clause.

9 And I suppose if this Court wants to, it can
10 say that for purposes of interim temporary relief, the
11 Court can look at section 5 directly. I would think the
12 better answer is, no, you just focus it on section 2,
13 the Equal Protection Clause, and then you ensure that
14 the judicial plan is consistent with section 5
15 principles, because that's the test that the Court's
16 going to apply in any event.

17 JUSTICE KENNEDY: Can you -- can you tell me
18 with reference to the two districts, other than the
19 Senate district, congressional and State house
20 districts, did Judge Smith defer or use these -- the
21 Texas legislature's 2011 plan as a benchmark to some
22 extent?

23 MR. CLEMENT: I -- I don't think Judge
24 Smith -- if I can answer your question, I think this
25 does: I don't think Judge Smith did this the way that

1 we think he should or focused on the benchmark. If you
2 look at the congressional plan, what he did is he just
3 basically picked one of the proposals, that was a
4 bipartisan proposal, the so-called C216.

5 With respect to the House plan, I think he
6 got it -- the Texas House plan -- I think he got it
7 closer to right. But I don't think he applied the right
8 standard. And I would ask you to look at Joint Appendix
9 193, and particularly his consideration of House
10 district 33. Because there, what Judge Smith did is
11 said, well, you know, there's these allegations, and I
12 find this -- he said the State has persuasive responses,
13 but out of an abundance of caution I am going to redraw
14 the districts.

15 That doesn't seem quite right. I mean, if
16 the State really does have persuasive responses, that
17 ought to be enough to not redraw the districts.

18 JUSTICE KENNEDY: So you would fault his
19 solution for giving insufficient deference to the State
20 of Texas 2011 plan?

21 MR. CLEMENT: That's right, but it's
22 certainly a fair improvement over what the district
23 court majority did.

24 If I could reserve the balance of my time.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 Mr. Clement.

2 Mr. Srinivasan.

3 ORAL ARGUMENT OF SRI SRINIVASAN,
4 FOR UNITED STATES, AS AMICUS CURIAE, SUPPORTING
5 AFFIRMANCE IN PART AND VACATUR IN PART

6 MR. SRINIVASAN: Thank you,
7 Mr. Chief Justice, and may it please the Court:

8 The fundamental flaw with Texas's approach
9 is that it directly inverts the burden established by
10 the Voting Rights Act. Section 5 places the burden on a
11 covered jurisdiction to show that a proposed voting
12 change is nondiscriminatory in purpose and effect, and
13 the change can't go into effect unless and until the
14 State carries its burden in that regard.

15 JUSTICE KENNEDY: Let me ask you this.
16 Suppose that this -- all the facts are the same except
17 that this is in a State that is not subject to section
18 5.

19 Would there be a problem in your view with
20 what the district, with what the district court did,
21 with Judge Smith -- with what Judge Smith did?

22 MR. SRINIVASAN: Well, with what Judge Smith
23 did, I guess in that context, Justice Kennedy, there
24 wouldn't be a section 5 issue at all.

25 JUSTICE KENNEDY: Right.

1 MR. SRINIVASAN: All you would be dealing
2 with is section 2 or the Equal Protection Clause.

3 JUSTICE KENNEDY: And then we could use --
4 then there would be no problem with using Texas as a
5 benchmark, the Texas 2011 as benchmark, as a starting
6 point, as a starting point?

7 MR. SRINIVASAN: Well, I guess what I would
8 say is this, that in the malapportionment context what
9 this Court typically has said the district court should
10 do is to start with a plan that is already in effect and
11 then modify it according to neutral districting
12 principles to remove the malapportionment issue.

13 JUSTICE ALITO: What are neutral districting
14 principles? Anybody who draws a map faces at the outset
15 certain legal constraints, constitutional constraints,
16 restrictions that are imposed by the Voting Rights Act,
17 maybe some State law restrictions to the extent they are
18 not inconsistent with Federal law. Once you have gotten
19 beyond that point, all you have left is districting
20 policy.

21 They are policy choices and there are many
22 factors that can be taken into account in drawing a map:
23 How compact you want the districts to be, to what extent
24 are you going to respect zones of economic interest, to
25 what extent are you going to try to preserve old

1 districts, what about incumbents, what about party
2 registration? Are you going to try to have balance or
3 are you going to try to favor one party or the other?
4 That's all -- those are all questions of policy.

5 And the question is who makes those policy
6 decisions? Are they going to be the policy decisions
7 that were made by the legislature, or are they going to
8 be the policy decisions made by the district court? And
9 to say they are going to apply neutral districting
10 principles is a subterfuge. There is no such thing.

11 MR. SRINIVASAN: I guess I would disagree
12 with you, Justice Alito. I want to make two preliminary
13 observations on what a district court is supposed to do
14 in this regard, and then I'll try to walk through the
15 principles that should guide this inquiry.

16 The first preliminary observation is what a
17 district court is not supposed to do, and what a
18 district court is not supposed to do is to take the
19 unprecleared plan as a given, because section 5
20 forecloses it. Now, what's a district court supposed to
21 do? It's not at sea, contrary to the underpinning of
22 some of the arguments made today, because the district
23 court starts with the last legally enforceable plan,
24 which after all is the last manifestation of State
25 policies and priorities. So you have that as a starting

1 point. And then it has to modify that plan, of course,
2 to deal with malapportionment issues and to comply with
3 section 2 and section 5 --

4 JUSTICE ALITO: I don't want to interrupt
5 you too much, but even if you do that, even if you start
6 with the old plan and then you modify it to the extent
7 necessary to comply with Constitution and statutes,
8 there are still -- I'm sure our computer could shoot out
9 dozens and dozens of possible maps, and somebody has to
10 choose among them. Now what criteria does a district
11 judge, does a district court use in making that choice?

12 MR. SRINIVASAN: There is discretion in the
13 inquiry, Justice Alito. I am not going to -- I'm not
14 going to disagree with that. What it looks to is the
15 districting criteria that had been applied by this
16 jurisdiction in the past. For example, in this case --

17 JUSTICE SCALIA: It's not just discretion.
18 It's political discretion. That's what's troublesome
19 about it. It seems to me the government takes an
20 absolutist approach to the proposition that you cannot
21 use an unprecleared plan for any purpose. All the law
22 says is that you cannot apply a precleared plan. The
23 plan being applied here is not the Texas legislature's
24 plan; it's the plan -- a remedial plan adopted by
25 Federal judges.

1 And to say that they cannot use in drawing
2 up that plan the legislature's last political decisions
3 seems to me not required by the mere prohibition against
4 implementing that plan as the plan of the legislature.

5 What would you do if -- if the district
6 court in Washington and the district court in Texas,
7 neither one of them acts in time, and it's too late?
8 It's too late to have any -- any primaries anymore?
9 What would happen?

10 MR. SRINIVASAN: Well, I guess --

11 JUSTICE SCALIA: What would happen? You
12 can't use the old plan. You have an absolute rule
13 against using the new plan. What happens? You
14 disenfranchise every voter in Texas --

15 MR. SRINIVASAN: No, I don't think you
16 should do that.

17 JUSTICE SCALIA: -- because there may be
18 some voters in Texas, may be, some who will be
19 prejudiced by using the current plan? I suggest in that
20 situation there is nothing to do but use the Texas plan.

21 MR. SRINIVASAN: Well, I don't -- not in the
22 context of section 5, Your Honor. That's one option,
23 but the other option would be to use a malapportioned
24 plan, which this Court has suggested would be something
25 the courts could do. Now, that is not a preferred

1 option, to be sure.

2 But we are not in that situation here,
3 because what you have is interim maps that have been
4 developed. We are not in the kind of emergency
5 situation that you are positing.

6 JUSTICE SCALIA: You acknowledge that there
7 are some situations in which you can use the very plan
8 that the Texas legislature adopted, even though it's not
9 been precleared?

10 MR. SRINIVASAN: Only if there is no time
11 for the district court to adopt a different plan. But
12 if --

13 JUSTICE SCALIA: So it's no longer an
14 absolute rule. So the question is whether this is
15 another reasonable exception to a non-absolute rule.

16 MR. SRINIVASAN: There is an emergency
17 exception, as there is with all sorts of legal rules.
18 But that's so far as we would go.

19 Now, I would like to address the proposition
20 that suggestions what the Court would be doing here
21 under Texas's view is just a standard application of
22 substantial likelihood of success principles, because
23 it's not. It's decidedly different from standard
24 operation of substantial likelihood of success
25 principles in three fundamental respects.

1 The first goes to the burden,
2 Justice Kennedy, and I think you alluded to this in your
3 question. The burden in a preliminary injunction
4 context stays with the same party at the preliminary
5 injunction stage as at the merits stage. And so when in
6 a preliminary injunction context the court is asking,
7 has there been a substantial likelihood of success on
8 the merits, the same party has to make that showing as
9 has to make that showing at the merits stage.

10 Here Texas would turn that upside down,
11 because at the merits stage, which is the preclearance
12 proceeding --

13 JUSTICE KAGAN: Well, would it be okay if we
14 just said, well, Texas has to make the showing?

15 MR. SRINIVASAN: That would certainly be
16 better. I think that would improve things quite a bit.
17 But that's not what Texas -- the approach that Texas
18 proposes today.

19 But it's different in two other respects
20 from a standard preliminary injunction context as well.
21 And one is what Justice Ginsburg alluded to, which is
22 here you don't have a situation in which the same court
23 that's going to forecast its ultimate adjudication of
24 the merits is also deciding what it's going to do at the
25 preliminary injunction stage.

1 CHIEF JUSTICE ROBERTS: Well, that's exactly
2 right, but you see it only on one side of the problem.
3 You say, well, you can't treat it as if it's being
4 pre-cleared because that would be prejudging what the
5 court is doing in D.C. But you have no trouble with
6 them saying, assuming that there are going to be these
7 section 5 violations, in drawing additional
8 majority-minority districts, which is just assuming in
9 the other way what the court here in D.C. is going to
10 do.

11 I don't know how you lean one way and say,
12 it's horrible, you can't use it because it hasn't been
13 precleared, but it's all right in drawing the interim
14 plan to treat it as if preclearance has been denied.

15 MR. SRINIVASAN: I don't know about that,
16 because I think what a district court is supposed to do
17 when preclearance is pending is not accept all the
18 challenges. What it is supposed to do is to apply
19 traditional districting criteria to the benchmark. So I
20 guess --

21 JUSTICE KAGAN: So do you contest the view
22 that this district court did essentially accept the
23 challenges, did sort of say, well, look, there are these
24 challenges, so we have to make sure that we don't do
25 anything that cuts against them?

1 MR. SRINIVASAN: Well, there is some
2 language in the opinions to that effect,
3 Justice Kennedy. I have to say the district court
4 opinions here are not a model of clarity. In some
5 respects, they seem to outline the right inquiry. If
6 you look at Joint Appendix 137 to 138, I think what the
7 district court said it was doing was starting with the
8 status quo, which is the benchmark, and then modifying
9 it.

10 CHIEF JUSTICE ROBERTS: And if you look --
11 and if you look at Joint Appendix 146 to 147, it looks
12 the exact opposite. It looks like they're drawing
13 minority coalition opportunity districts to draw them,
14 because they have anticipated how they think the
15 district court in D.C. is going to come out.

16 MR. SRINIVASAN: Well, that's right,
17 Mr. Chief Justice, and I think we point to that in our
18 brief as an area in which the district court could give
19 further explanation on remand.

20 CHIEF JUSTICE ROBERTS: You do.

21 JUSTICE KENNEDY: Isn't it odd that this is
22 a section 2 suit and yet section 5 seems to be driving
23 that -- driving it. That's the problem with this
24 litigation, it seems to me.

25 MR. SRINIVASAN: I think section 5 can't

1 help but drive --

2 JUSTICE KENNEDY: And section 5 applies only
3 to some States and not others. Texas is at a tremendous
4 disadvantage here in defending the section 2 suit and in
5 drawing -- and in having -- and the judiciary is at a
6 disadvantage in framing a remedy for a likely, a likely
7 section 2 violation in some of the districts.

8 MR. SRINIVASAN: Of course, Your Honor,
9 Texas is in a different position precisely because it's
10 a covered jurisdiction. And when you have a section 5
11 case, section 5 can't help but take precedence in some
12 respects, precisely because a proposed change can't go
13 into effect unless and until the covered jurisdiction
14 shows that it's nondiscriminatory in purpose and effect.
15 But I do think it's important --

16 JUSTICE KENNEDY: I wonder if it should take
17 precedence in a section 2 suit. All this -- this is the
18 primary obligation of the Texas district court, is to
19 address section 2 violations.

20 MR. SRINIVASAN: That -- that may be, Your
21 Honor. But I think then if, if it can't address the
22 section 5 issue at all, then the one thing that
23 shouldn't happen is that the section 2 court gives
24 effect to the unprecleared plan, because that is
25 something that the D.C. district court is supposed to

1 do.

2 JUSTICE KENNEDY: It's not giving effect to
3 an uncleared plan. It's giving effect to a legislative
4 judgment as to what is workable for all the factors and
5 criteria that Justice Alito referred to, county lines,
6 et cetera.

7 CHIEF JUSTICE ROBERTS: We will let you go
8 on for a little longer. We may have a few more
9 questions.

10 MR. SRINIVASAN: Okay. Thank you,
11 Mr. Chief Justice. I appreciate that.

12 I guess what I would say, Justice Kennedy,
13 is, if you use the unpreclear plan as the starting
14 point, which is what Texas proposes, you are giving
15 effect to that, notwithstanding the preclearance
16 requirement of section 5. And with the covered
17 jurisdiction, that is something that section 5 doesn't
18 allow.

19 Now, I do think it's important to consider
20 Texas's preclearance submission in the context of the
21 other statewide preclearance submissions that have been
22 submitted in this election cycle. If you look at the
23 government's brief at pages 1a to 3a, I think what that
24 bears out is that there is not a fundamental problem
25 with section 5 or the way section 5 operates. The

1 problem insofar as it exists is with respect to the
2 particular submissions that Texas has made, because
3 there were 20 submissions of statewide plans for
4 administrative preclearance. In all 20 cases, the
5 Attorney General precleared them. In 19 of the
6 20 cases, the Attorney General precleared it within the
7 initial 60-day window. Now --

8 CHIEF JUSTICE ROBERTS: Counsel, I have --
9 Your position -- I understand you're straddling a
10 position. That's why you are sitting in the back rather
11 than the front row between the two parties. But it's a
12 little unsatisfying because what you say we should do
13 when we are all under the gun of very strict time
14 limitations is we should send it back to the district
15 court so it can give a greater explanation of what it's
16 done.

17 Isn't that going to be very wasteful? And
18 it's kind of an odd order from this Court to send to a
19 district court saying, you know, tell us more.

20 MR. SRINIVASAN: Well, I don't know that it
21 is, Your Honor, and I have two responses in that
22 respect.

23 First, and this goes to a question that
24 Justice Alito asked earlier, what is this Court supposed
25 to do in this situation? And I think one thing that

1 could absolutely happen is if there were a remand the
2 D.C. district court could complete its preclearance
3 proceeding, which would be illuminating the what the
4 Texas district court is supposed to do. And to have
5 guidance on that --

6 JUSTICE BREYER: Did you have -- what is
7 that based on?

8 MR. SRINIVASAN: What I would say is this.
9 The D.C. district court has scheduled trial to begin on
10 January 17th. It's supposed to last 8 days. Closing
11 argument is on February 3. If you look at what happened
12 at the summary judgment stage, Justice Breyer, they had
13 summary judgment arguments on one day --

14 JUSTICE BREYER: Yes, I read, I read, I read
15 the opinion and what you said on the phone and so forth.

16 MR. SRINIVASAN: No, not that.

17 JUSTICE BREYER: It seems to me that it's a
18 complicated case. Let's suppose you are completely
19 right on your time schedule. Then they will decide
20 something. How could any human being redraw maps in 5
21 days or 10 days where you will have different -- 6
22 different positions. I mean, I think it's impossible.
23 How can you -- I don't see how you can do it.

24 MR. SRINIVASAN: Well, of course, if
25 preclearance is granted we won't have an issue with

1 drawing maps.

2 JUSTICE BREYER: Well, I think there's -- it
3 seemed to me from reading it, I didn't think that the
4 judge there is ready to grant preclearance.

5 And the other thing in sending it back, I
6 read the brief and then I read the opinions. I don't
7 think I have -- I'm not being too generous to the
8 opinions, but I thought that they were saying throughout
9 is: We didn't try to draw extra coalition or extra
10 opportunity districts; they emerged. They say "emerged"
11 about seven times. They emerged as we tried to apply
12 equal vote principles. And it's hardly surprising that
13 it would, considering that the population growth is
14 primarily due to the minority expansion.

15 So it didn't seem to me -- now why do you
16 want us to send it back to get more explanation when
17 that seems to be the explanation, and to me at first
18 blush, it seems like a perfectly good explanation.

19 CHIEF JUSTICE ROBERTS: Maybe -- brief
20 answer, please.

21 MR. SRINIVASAN: Yes. Sure. I think
22 insofar as the coalition districts and ability districts
23 emerge from growth, there is nothing suspect about them.
24 The one example I point to is District 33. If you look
25 at Joint Appendix, pages 146 and 147, it's not clear

1 what the, what the district court was doing in that
2 regard.

3 CHIEF JUSTICE ROBERTS: Thank you, counsel.
4 Mr. Garza?

5 ORAL ARGUMENT OF JOSE GARZA
6 ON BEHALF OF THE APPELLEES

7 MR. GARZA: Mr. Chief Judge, and may it
8 please the Court:

9 There seems to be general consensus on at
10 least three points that we've talked about today.
11 First, that the unprecleared plan cannot take effect.
12 The second, that the district court is foreclosed from
13 entering and engaging in an analysis of the issues that
14 are pending before the three-judge court in Washington,
15 D.C., and that at this point, a court ordered plan must
16 be implemented on an interim basis.

17 JUSTICE SCALIA: Exclude me from the second.
18 I'm not sure that I have gone along on that, as you
19 phrased it. The way you phrase it, you say they cannot
20 even make the kind of preliminary inquiry that your
21 friend suggests.

22 MR. GARZA: I think we are dealing with a
23 matter of semantics, Your Honor, because the question
24 is, did the Court give the State's plan deference. But
25 it itself said that it began, as it should, as it has

1 been directed by this Court with the historical or
2 benchmark configurations, and then respected the State's
3 plan.

4 JUSTICE KAGAN: But you know what I don't
5 understand about your briefs, Mr. Garza. If the States
6 can't -- if, if -- if the plan has not been precleared,
7 you should be saying that the States can't look at the
8 plan. But on the one hand you are saying, well isn't it
9 great because the Court did look at the plan, and on the
10 one hand-- the other hand you are saying the Court can't
11 look at the plan. So which is it? Because there is a
12 real tension. On one page you say isn't it great, the
13 Court looked at the Texas plan. And then you say the
14 Court can't look at the Texas plan.

15 MR. GARZA: We don't say that the Court
16 can't look at the Texas plan. What we say is that the
17 Court, the Court can't implement the Texas plan, and it
18 certainly can't implement the Texas plan if there is any
19 suspect of discrimination. And what it did was exactly
20 the right measure.

21 JUSTICE SOTOMAYOR: Then you are saying the
22 Court should look at the merits.

23 MR. GARZA: I think that the Court did the
24 appropriate thing by looking at the -- at this matter.

25 JUSTICE SOTOMAYOR: No. Let's, let's go to

1 something Justice Scalia asked was, what does a court do
2 with frivolous claims? Does it assume under your theory
3 that those frivolous claims are valid? And if you say
4 no, it shouldn't assume that, then what level of inquiry
5 should the Court engage in before it accepts or deviates
6 from the enacted plan?

7 MR. GARZA: I think that the Court should
8 look at-- first of all, should not start with the
9 State's plan. It should look at where there have been
10 objections made. And the role of the district court in
11 the District of Columbia is where the question of
12 whether there are frivolous claims have been made. And
13 there have been no motions to dismiss any of the claims
14 in Washington, D.C. based on frivolity.

15 JUSTICE SOTOMAYOR: So the Texas court
16 cannot -- should automatically accept all -- that every
17 district that a challenge has been raised in the DC
18 Circuit Court is okay?

19 MR. GARZA: It should not accept any of the
20 districts that have been challenged. But I think the
21 difference in terms of even assuming a violation--

22 CHIEF JUSTICE ROBERTS: I'm sorry, I don't
23 mean to interrupt, but I didn't follow that. So long as
24 a district has been challenged in DC, the court in Texas
25 should not accept it?

1 MR. GARZA: It should make a determination
2 either way, and it didn't. Because in those districts,
3 it didn't adopt the plans that were put forward by the
4 plaintiffs or the challengers in Washington, D.C. it
5 looked at the benchmark plan as a starting point.

6 JUSTICE KENNEDY: But could it look at the
7 district and say, well, it respects county lines; it
8 follows a river; it's got urban/rural. Can it look at
9 it for that reason and rely on the legislative judgment
10 as making a sound judgment that the river runs through
11 here, and the county line is there and so forth? That's
12 what seems to me the difficulty with saying oh, you
13 can't look at the plan.

14 MR. GARZA: I think the problem with that,
15 Your Honor, is that then it would be assuming that the
16 State is correct, that it doesn't violate section 5.
17 That is -- that is an inquiry that is reserved to the
18 district court in the District of Columbia.

19 CHIEF JUSTICE ROBERTS: And that's right,
20 but it goes the other way when you say they can't
21 approve something that's been challenged. Aren't you
22 assuming that the plaintiffs are right?

23 MR. GARZA: No.

24 CHIEF JUSTICE ROBERTS: And that's an
25 inquiry that belongs to the district court in D.C.

1 MR. GARZA: No, because what the court did,
2 is it didn't accept as a remedy what the plaintiffs
3 proposed there. It reverted to State policy which is
4 what it's directed to by this Court. It direct-- It
5 went back to State policy and it looked at the benchmark
6 plan, and it started with the benchmark plan. Even with
7 the congressional plan, where there are four new
8 districts, and there is no comparable district in the
9 benchmark, it looked to the legislatively enacted plan
10 to determine where to replace those districts.

11 JUSTICE SCALIA: But that is not the current
12 State policy. The benchmark plan is gone. It's old.
13 The Texas legislature now has a different policy, and
14 that, you say, should be ignored.

15 MR. GARZA: That policy cannot be deferred
16 to. It is incorporated in the court's plan by -- in the
17 manner in which it did review the plans. That is --

18 JUSTICE SCALIA: There is a presumption of
19 its invalidity. You can't presume it valid, but you can
20 presume it invalid.

21 MR. GARZA: Either way. And, in fact, what
22 the Court did--

23 JUSTICE SCALIA: Well, not either way. You
24 are presuming it invalid.

25 MR. GARZA: It -- you are not presuming it

1 is invalid. You're -- you are suggesting that -- you
2 are reverting to the next State policy. You are not
3 incorporating it, but you're not -- you are not making
4 any decision. And the way you sort of walk that
5 tightrope is you go to what the State policy was before
6 the enacted -- plan.

7 JUSTICE ALITO: Let's say a legislature
8 says -- says we have a new policy, and that is that once
9 we've satisfied our constitutional obligations and our
10 obligations under the Voting Rights Act, the only thing
11 we are going to do is try to draw the districts that are
12 the most compact possible, compactness over everything
13 else.

14 They draw up a plan that embodies that
15 policy, and it's challenged under section 5. Now can
16 the district court just say well, that's -- the State's
17 policy is compactness over everything else, but we don't
18 agree with that, because we have other neutral
19 principles that advance the interest of the collective
20 public good, which is the -- the term that this --
21 the -- the words that this Court used. Can they do
22 that?

23 MR. GARZA: I don't believe they can, and
24 this Court didn't. The Court in fact --

25 JUSTICE ALITO: Well, if they can't do that

1 then you are saying that they are constrained by State
2 policy, except to the extent the Constitution or the
3 Voting Rights Act requires otherwise.

4 MR. GARZA: And in this case, part of the
5 Voting Rights Act is section 5, and in those areas and
6 in those districts where there have been challenges --
7 and by the way the district court has -- in the District
8 of Columbia has determined that those challenges are
9 substantial, because they have denied preclearance. And
10 in fact they've said that Texas has not disputed --

11 JUSTICE GINSBURG: They denied summary
12 judgment. They didn't deny preclearance.

13 MR. GARZA: I'm sorry?

14 JUSTICE GINSBURG: They denied summary
15 judgment.

16 MR. GARZA: They denied summary judgment,
17 but they went even further. They said Texas has not
18 disputed many of the intervenors' specific allegations
19 of discriminatory intent. So it's -- it's -- and under
20 the summary judgment standard, they have to find that
21 the challenges that are being made are substantial.

22 The district court in Texas was not free to
23 incorporate discriminatory districts in its interim
24 plan, and it didn't. But it first went to the State's
25 plan, the benchmark plan, to begin its process on how it

1 was drawing those districts.

2 And there is a good reason why Texas is
3 covered under the Voting Rights Act. As this Court
4 indicated in -- in LULAC v. Perry, there is a terrible
5 history of historical discrimination in Texas, including
6 discrimination --

7 CHIEF JUSTICE ROBERTS: The
8 constitutionality of the Voting Rights Act is not at
9 issue here, right?

10 MR. GARZA: That's not.

11 CHIEF JUSTICE ROBERTS: Okay. Maybe you
12 could turn to the issue that I see on Joint Appendix 146
13 and 147. They don't say a minority coalition
14 opportunity district just happened to emerge. It said
15 that district 33 was drawn as a minority coalition
16 opportunity district. And we have never held that it is
17 appropriate or even permissible to draw a district where
18 you are putting in together two minorities, two
19 different minority groups. And it seems to me that that
20 raises all sorts of different concerns.

21 It's one thing under the Voting Rights Act
22 to say that this group votes as a bloc and has been
23 discriminated against in its ability to elect
24 representatives of its choice. It's another thing to
25 say that two different minority groups are put together

1 because they share some particular view so that one
2 candidate is going to be each of theirs candidate --
3 candidates of choice. That goes quite a step further
4 from what we have upheld under the Voting Rights Act.
5 And here you are have of the district court creating
6 that in the absence of any State expression of a desire
7 to create that type of -- of district.

8 MR. GARZA: I think -- I think that the
9 statement that the Court made is a correct statement, it
10 did create a coalition district in Dallas. But that's
11 not describing how it reached that -- that district.
12 However, it describes how it reached that district is in
13 a number of other places; however, as discussed above
14 the court has not intentionally created any minority
15 districts.

16 CHIEF JUSTICE ROBERTS: New district 33 was
17 drawn as a minority coalition opportunity district. I
18 don't see how that can be read any way other than
19 saying -- saying when we sat down and drew it, we drew
20 this one as a minority coalition opportunity district.

21 MR. GARZA: Of course it can be read
22 differently than Your Honor's interpretation of this,
23 because the court has said over and over again we did
24 not attempt to create coalition districts, we did not
25 attempt to draw --

1 CHIEF JUSTICE ROBERTS: I'm sorry, when you
2 are saying something can be read differently than that,
3 and say because they said something else somewhere else,
4 that is not responsive.

5 MR. GARZA: What I'm -- what I'm suggesting
6 is what he is saying is that this is the result of what
7 they have done. That sentence can also be interpreted
8 as saying this is the result of what we have done. We
9 have created a --

10 JUSTICE SCALIA: Drawn as? Drawn as the
11 coalition?

12 MR. GARZA: Yes. Yes.

13 JUSTICE BREYER: -- two sentences forward,
14 if I could help with the reading, the fourth new
15 district, district 33 was drawn in the Dallas-Fort Worth
16 Metroplex "to reflect population growth in that area."
17 All right? Then he goes on to say just what
18 Justice Scalia says.

19 And I -- I did read that as saying, well,
20 when you apply -- I read it consistent what they have
21 said in -- elsewhere, which is that what they are doing
22 is, population grows, you have to have one person, one
23 vote; the legislature itself in the new plan did create
24 a minority, whatever you -- the opportunity district
25 here, so we are following what they did. We are taking

1 into account population, and it turns out to be, and we
2 do create it as -- in which case there is some ambiguity
3 here.

4 MR. GARZA: Precisely. And there is no
5 independent evidence that this was a racial gerrymander.
6 What do courts look at for evidence of racial
7 gerrymanders? Split voting precincts where you go out
8 in cars and bring in minority voters. This district
9 maintains voting precincts intact. It is entirely
10 within one county. It is a compact district.
11 Especially when you compare it to the district in that
12 part of the State --

13 CHIEF JUSTICE ROBERTS: I'm sorry, why --
14 why do you care -- why do they care then that it was
15 drawn as a minority coalition opportunity district? You
16 are saying they didn't do that at all. They just
17 followed precinct lines and everything else. Why would
18 they say something?

19 MR. GARZA: I believe it is describing what
20 the results of their map drawing is, and I think that is
21 perfectly legitimate.

22 JUSTICE KENNEDY: Can we infer from either
23 the ambiguity or the other reading of the sentence that
24 the Chief Justice suggested that in the court's view it
25 was desirable to have a minority coalition district? I

1 draw that inference.

2 MR. GARZA: I think -- I think it is
3 desirable to have a minority district there.

4 JUSTICE KENNEDY: A minority coalition
5 district?

6 MR. GARZA: A minority coalition district.
7 Moreover, I think the court is --

8 JUSTICE KENNEDY: All right. So you would
9 defend the plan on the grounds that this is a sound
10 result?

11 MR. GARZA: I believe that the plan that was
12 drawn by the court is fair. Is it the optimum plan that
13 the plaintiffs wanted? It is not.

14 JUSTICE SCALIA: One of -- one of -- one of
15 the basic rules that was followed in drawing up the
16 court plan was not to divide any voting districts,
17 right?

18 MR. GARZA: That's one of the principles.

19 JUSTICE SCALIA: Why? Why did the -- that
20 certainly is not a principle that the Texas legislature
21 agrees with.

22 MR. GARZA: There is two reasons, Your
23 Honor. One is --

24 JUSTICE SCALIA: So the court just made it
25 up?

1 MR. GARZA: No. There are two reasons why
2 the court saw maintaining voting precincts is important.
3 One is because that is what it's been directed by this
4 Court in Bush v. Vera. In Bush v. Vera the Court said
5 we have an interim election or a -- or an impending
6 election and it's important for elections administrators
7 in -- in order to be able to -- to implement without --
8 without interference a legitimate election process, to
9 have whole precincts, because whole precincts makes a
10 big difference in terms of how the election is -- is
11 administrated.

12 The second reason is that this court didn't
13 adopt this plan without any inquiry into the standards
14 and proposals from the parties. It was very deliberate.
15 It was very cautious, and it was very open. We had 3
16 days of hearings on what these plans should look like
17 and what the standards ought to be, including testimony
18 from elections administrators and from the Texas
19 Secretary of State.

20 And in every instance those administrators
21 and that representative from the Secretary of State said
22 the most important thing the court should consider, if
23 it's going to order us to start conducting elections
24 under a different plan, is maintain voting precincts,
25 because that is the most cumbersome part.

1 JUSTICE ALITO: Well, if Texas says we don't
2 care about maintaining voting precincts; this is -- this
3 is a matter of -- of administrative burden and expense,
4 and we are willing to bear that, so disregard that. The
5 district court can say well, we think, we disagree with
6 you; in order to make it more convenient to hold the
7 election and less expensive for Texas, we are going to
8 respect voting districts. They can do that?

9 MR. GARZA: The State didn't do that in this
10 instance.

11 JUSTICE ALITO: But could they do that?

12 MR. GARZA: And --

13 JUSTICE ALITO: Could the district court do
14 that? That's my question.

15 MR. GARZA: It's -- yes, I think they could,
16 because there's still the authority of this Court in
17 Bush v. Vera that directs courts, in drawing interim
18 plans for impending elections, to be cautious about
19 that, number 1. And number 2, if in fact in order to
20 get an appropriate map you must split a number of
21 precincts, which means then that you can't conduct the
22 election on April 3, we still have time, as -- as the
23 government's attorney indicated, the -- there are States
24 that conduct primaries as late as June 26th. The
25 drop-dead deadline is not April 3rd, it's November 6th.

1 So if this Court disagrees with our
2 position, and is determined to send this back to the
3 district court, then it should consider this: the
4 District Court in the District of Columbia is about
5 30 days away from rendering a complete decision in the
6 section 5 case. That would place the court in Texas in
7 exactly the Upham circumstance. In that circumstance --
8 and the court is poised to move. It can move with all
9 due diligence. It had two weeks of trial in which it
10 heard testimony on the plaintiffs' claims. It is ready.

11 Once the District Court in the District of
12 Columbia tells us these are the problems with the
13 State's plan, the court in Texas is primed to make its
14 decision on the plaintiffs' claims under section 2 and
15 the Constitution.

16 And under that circumstance --

17 JUSTICE SOTOMAYOR: Mr. Garza, what's the
18 real drop-dead date? It's not November 6th, because
19 that's the date of the general election. What's the
20 latest election -- primary election that any State has?
21 June 26th?

22 MR. GARZA: June 26th, Your Honor.

23 JUSTICE SOTOMAYOR: All right. So, working
24 backwards -- the last --

25 JUSTICE ALITO: That's for presidential

1 primaries, isn't it? I don't want to interrupt, but
2 isn't that the date of the last presidential primary
3 rather than congressional?

4 MR. GARZA: That's correct. So Utah is the
5 last -- is the State with the last primary in which it
6 conducts both the State's primary and the presidential.
7 There are in States -- in fact, States that conduct
8 primaries as late as September that have no presidential
9 primaries at all.

10 JUSTICE SOTOMAYOR: So how many days before
11 that election do the -- does the voting mechanism or
12 apparatus need to set up the voting booths, et cetera?

13 MR. GARZA: The -- the critical date is
14 45 days from the election in order to ensure -- sending
15 out a ballot to overseas voters, including the military.
16 So if -- if you go back 45 days and then you give the
17 jurisdiction sufficient time to develop a ballot,
18 because you need a ballot to send to the -- to the
19 soldiers, then that's about -- what they -- what the
20 testimony was is that takes about -- 90 days, I believe
21 is what they testified. So 45 days plus 90 days, and
22 that's the drop-dead deadline.

23 JUSTICE SCALIA: Go back from June 26th.
24 Where does that leave us?

25 MR. GARZA: If go back from June 26th --

1 JUSTICE SCALIA: June, May, April. It's the
2 end of March. Right?

3 MR. GARZA: You could develop a plan by the
4 end of March, and we could conduct an election in June,
5 in late June.

6 JUSTICE SCALIA: When do you expect the D.C.
7 court to finish?

8 MR. GARZA: I would expect it to finish
9 by -- within 30 days of today, because we have closing
10 arguments on the 3rd of February, and if the court will
11 act with the sort of diligence that it did on summary
12 judgment, which was a complicated record and a large
13 record, 6 days later, it made its determination. It
14 didn't issue its memorandum opinion, but it gave us
15 something that we could run with.

16 CHIEF JUSTICE ROBERTS: When -- and when do
17 you expect our decision on the appeal from the district
18 court from D.C.?

19 (Laughter.)

20 MR. GARZA: Later this afternoon.

21 (Laughter.)

22 JUSTICE GINSBURG: They did write in a -- in
23 their summary judgment opinion, they made it sound like
24 it's very complicated.

25 MR. GARZA: Yes.

1 JUSTICE GINSBURG: And so that's why I'm --
2 I have some doubts about how swiftly they're going to
3 render their decision after -- what is the date, the
4 trial will end on February 3rd?

5 MR. GARZA: That will be closing arguments,
6 yes, Your Honor.

7 JUSTICE KENNEDY: Is there anything in the
8 opinion from the three-judge court in the District of
9 Columbia that indicates that there are some likely
10 potential violations that are section 2 violations as
11 well as section 5 violations?

12 MR. GARZA: From the -- from the --

13 JUSTICE KENNEDY: And -- and I can amend
14 that to -- and in the submission of the parties.

15 MR. GARZA: In the District of Columbia?

16 JUSTICE KENNEDY: Yes.

17 MR. GARZA: Well, I believe that the -- that
18 the court has found that the -- the plaintiffs have made
19 substantial claims with regard to retrogression and
20 intentional discrimination. And of course, intentional
21 discrimination --

22 JUSTICE KENNEDY: The second -- the second
23 being section 2 violations as well.

24 MR. GARZA: Intentional discrimination is a
25 component of section 2, yes, Your Honor. And it -- and

1 I think it's important to note that Judge Smith in Texas
2 used, in a manner of speaking, the preliminary
3 injunction standard that's being advocated by the State,
4 and they would not be able to meet that standard because
5 generally, Judge Smith determined that the plaintiffs
6 had presented colorable claims of statutory or
7 constitutional infirmity. Ruled that the plan was an
8 extreme gerrymander. Ruled that elimination of District
9 149 presented section 5 problems. Ruled that the
10 legislature dismantle the minority district in Essex
11 County that presented --

12 JUSTICE KENNEDY: Do you have substantive
13 objections to the plans suggested by Judge Smith in the
14 house and congressional districts?

15 MR. GARZA: Yes, Your Honor. We believe
16 that there are section 5 claims with regard to Harris
17 County. Judge Smith addressed the constitutional --

18 JUSTICE KENNEDY: Do you have some section 2
19 objections? Well, that doesn't quite work. You have to
20 talk about retrogression, I suppose.

21 MR. GARZA: Right. And in -- in District --
22 in Harris County, the court did equalize population per
23 the failure of the State to justify the sorts of
24 deviations that are contained in that district, but
25 didn't provide, in our opinion, additional remedies.

1 But Judge Smith's proposed plan for the
2 State house is in fact very similar to the plan that was
3 proposed by the majority. It -- it differs by only one
4 minority district. That is one additional minority
5 district is contained in the interim plan than is
6 contained in Judge Smith's plan.

7 JUSTICE KAGAN: Mr. Garza, what would you
8 think of a system in which the Court could start with
9 the Texas plan and say -- the new Texas plan -- and say
10 anything that is consistent with statutes and the
11 Constitution can go forward, but it's Texas that has to
12 show that consistency. So flipping the burden of proof
13 in the way that Mr. Srinivasan was suggesting? In a way
14 that makes it more consistent with section 5's burden.

15 MR. GARZA: Well, I -- I think that our
16 position is that section 5 is clear that this Court
17 should not start with the interim plan, but if the Court
18 disagrees with me, I think that that's a much more
19 reasonable approach than the one offered by the State,
20 for the same reason argued by the United States: that
21 is, that in the State's argument, you really turn
22 section 5 on its head, because one of the principal
23 benefits for the minority community in having section 5
24 is it alters of the burden of proof. And if you
25 maintain the burden of proof on the State before it can

1 implement any portion of its newly adopted but
2 unprecleared plan, that's far more preferable than
3 shifting the burden, which would be inconsistent with
4 section 5 in its intent.

5 I don't think I have anything else.

6 Thank you.

7 CHIEF JUSTICE ROBERTS: I don't think we do,
8 either.

9 Thank you, counsel.

10 Mr. Clement, you have 3 minutes remaining.

11 REBUTTAL ARGUMENT OF PAUL D. CLEMENT

12 ON BEHALF OF THE APPELLANTS

13 MR. CLEMENT: Thank you, Mr. Chief Justice.

14 Just a few points in rebuttal. As one of
15 Justice Alito's questions highlighted, one of the things
16 that makes remedying a one person one vote problem
17 particularly unique is there's literally an infinite
18 number of ways to solve the problem. And for that
19 reason, this Court has always looked wherever it could
20 to legislative guidance.

21 So much so that in *White v. Weiser*, this
22 Court looked for legislative guidance to a plan that had
23 been declared unconstitutional for failing to
24 accommodate one person one vote problems, but yet this
25 Court still said that the district court erred in not

1 taking them into account to the extent that it could.

2 As to the hard choice, if it comes to that,
3 of using either the legislative plan that reflects the
4 legislative will, or the judicial plan that even the
5 United States concedes is flawed, I think this Court has
6 faced even more difficult choices in the past: *Bullock*
7 *v. Weiser* and in *Whitcomb*. And in both of those cases,
8 this Court chose between an adjudicatedly
9 unconstitutional State plan and a judicial remedy that
10 it determined was flawed. And in both cases, it ordered
11 the election to take place under the flawed
12 constitutionally adjudicated imperfect plan.

13 Compared to that, simply saying that an
14 election should go forward under a plan that hasn't been
15 precleared is a far less serious step. Now, there was a
16 reference made to the 3 days of hearings. But the
17 problem is, 3 days of hearings with an unadministrable
18 standard is worse than 1 day of hearing with an
19 unadministrable standard.

20 And what we ask is for a preliminary
21 injunction standard that's familiar to everybody,
22 everybody understands and everybody can apply.

23 JUSTICE SCALIA: Well, why -- why shouldn't
24 it be inverted the way your friend suggests?

25 MR. CLEMENT: Well, I'll join everybody in

1 saying that that's -- that's better than the -- than the
2 worst alternative I face, which is to say it's better
3 than the district court's opinion.

4 But here's why it shouldn't. That actually
5 further intrudes on the D.C. court. Because the
6 question that the remedial court should not be asking
7 is, geez, do I really think -- you know, what are the
8 odds that the D.C. court is going to preclear? It
9 shouldn't ask that question at all. It should ask the
10 questions that are before it. Is there a section 2
11 violation? Is there an equal protection violation? If
12 there aren't those and I use the State's plan, does that
13 create a section 5 violation?

14 That is different from the preclearance
15 question. And on that section 5 question, the burden is
16 not logically on the State. And that's the same section
17 5 question that the Court considered on its own motion,
18 because it understands that even when it takes a plan,
19 it has to be consistent with Section 5 principles.

20 Now, Justice Kennedy, you've asked the
21 question, what if we take section 5 out of this, what
22 happens? Then it's an easy case. Then it's the
23 preliminary injunction standard. Now, the objection to
24 that, of course, is, well, but how can you take section
25 5 out of it? But there's not interference with section

1 5, because Texas still understands it needs to get
2 preclearance -- before its changes can take permanent
3 effect, it absolutely positively needs preclearance.
4 It's never wavered from that prohibition. So you go
5 back --

6 CHIEF JUSTICE ROBERTS: Finish your
7 sentence.

8 MR. CLEMENT: I was simply going to say if
9 you go back, the default problem here is that there's an
10 infinite number of solutions. It's particularly a
11 problem with respect to the Congressional map, where
12 there's not four new seats. There's nothing else to
13 defer to than the judgment of the legislature reflected
14 in this plan, notwithstanding that it hasn't been
15 precleared.

16 CHIEF JUSTICE ROBERTS: Thank you, counsel.

17 All counsel, I appreciate the extraordinary
18 efforts you had over the holiday season. Thank you very
19 much.

20 The case is submitted.

21 (Whereupon, at 2:08 p.m., the case in the
22 above-entitled matter was submitted.)

23

24

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